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N.Y. CONST. art. I, § 6:

In any trial in any court whatever the party accused shall be allowed to . . . be confronted with the witnesses against him . . . .

U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

COURT OF APPEALS

People v. Eastman[1]
(decided February 21, 1995)

Defendant Cecilio Eastman collaterally attacked his murder conviction on the ground that it abridged his Sixth Amendment right to confrontation[2] as defined in the United States Supreme Court's recent decision in *Cruz v. New York*.[3] In *Cruz*, the Court held that "the Confrontation Clause bars the introduction of a confession of a nontestifying co-defendant, not directly admissible against the defendant, that inculpates the defendant."[4] In *People v. Eastman*, the New York Court of Appeals concluded that *Cruz* applied retroactively[5] and that the admission of the co-defendant's inculpatory statement into evidence was harmful error which entitled Eastman to a new trial.[6]

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1. 85 N.Y.2d 265, 648 N.E.2d 459, 624 N.Y.S.2d 83 (1995).

2. U.S. CONST. amend. VI. The Confrontation Clause provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . " *Id.* N.Y. CONST. art. I, § 6. This section provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to . . . be confronted with the witnesses against him." *Id.*

3. 481 U.S. 186 (1987).

4. *Eastman*, 85 N.Y.2d at 268, 648 N.E.2d at 460, 624 N.Y.S.2d at 84.

5. *Id.* at 276, 648 N.E.2d at 465, 624 N.Y.S.2d at 89.

6. *Id.* at 278, 648 N.E.2d at 466, 624 N.Y.S.2d at 90.

In *Eastman*, a Con Edison security guard, Wilfred Barrett, was fatally shot during an attempted robbery.[7] Barrett told a police officer at the crime scene that he may have shot one of his assailants during the robbery attempt.[8] While he was lying on the ground suffering from a gunshot wound, the police brought a suspect back to the scene who Barrett identified as one of the assailants.[9] This suspect was later found not to be involved in the robbery attempt.[10]

Barrett died later at the hospital while receiving treatment in the emergency room.[11] Contemporaneously, the detective assigned to Barrett's case was informed that the defendant, Eastman, was also being treated in the emergency room for a gunshot wound he claimed he sustained in the same area where Barrett was fatally shot.[12] Surgery performed on Eastman yielded a bullet that was later identified as a bullet discharged from Barrett's gun.[13]

While in the hospital, the detective noticed three individuals, Carlos Croney, Carlos Richards and Rubin Charles, waiting in the emergency room area.[14] Believing that the three men might have information relating to the shooting, the detective had them brought to the precinct for questioning.[15] The detective discovered through interrogation that Croney, Richards and Eastman fled the crime scene in the same car and that the weapon used in Barrett's shooting was dropped off at Charles's apartment, where it was later recovered by the police.[16]

During the questioning by the detective, co-defendant Croney provided the following statement:

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7. *Id.* at 268, 648 N.E.2d at 460-61, 624 N.Y.S.2d at 84-85.
8. *Id.*
9. *Id.* at 268-69, 648 N.E.2d at 461, 624 N.Y.S.2d at 85.
10. *Id.*
11. *Id.* at 269, 648 N.E.2d at 461, 624 N.Y.S.2d at 85.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

> [Eastman] told me to stop the car . . . and wait. [Eastman] got out the car with [Richards] . . . . I heard more than one shot. [Richards] and [Eastman] came running back. [Eastman] told me he was shot. When they got out of the car, they had told me stop we see something. Either [Richards] or [Eastman] said we going to take the man off. When they came back [Richards] said the man shot [Eastman]. I took them to the hospital and drove off. The black gun was on the front seat of the car.[17]

The defendant Eastman was questioned twice by the detective in the hospital on the day of the robbery.[18] During the second questioning, an assistant district attorney and a stenographer were also present.[19]

Subsequently, Eastman and Croney were jointly indicted for murder in the second degree and criminal possession of a weapon in the second degree "under the theory that they were 'aiding the other and acting in concert with another person' in an attempt to commit a robbery, and in furtherance of such crime fatally shot Wilfred Barrett."[20]

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17. *Id.*

18. *Id.* During the initial questioning, the defendant stated that "he was in the car with Croney, who was driving, that Croney dropped him off, he heard a shot and that he sustained a gunshot wound." *Id.* at 269-70, 648 N.E.2d at 461, 624 N.Y.S.2d at 85. The defendant maintained that three anonymous persons "transported him to the hospital." *Id.* at 270, 648 N.E.2d at 461, 624 N.Y.S.2d at 85.

19. *Id.* At the second questioning, the defendant stated that both Croney and Richards were in the car with him and that Richards wanted to steal an envelope which was in Barrett's possession. *Id.* He also stated that both Richards and himself exited the car and that it was Richards who attempted to take the envelope from Barrett. *Id.* Eastman claimed that while he was walking towards the encounter, he heard a gun shot and turned to run away. *Id.* at 270, 648 N.E.2d at 461-62, 624 N.Y.S.2d at 85-86. At that point, he realized he had been shot. *Id.* at 270, 648 N.E.2d at 462, 624 N.Y.S.2d at 86. As he ran away, Eastman told Croney he had been shot and asked Croney to take him to the hospital. *Id.* While being interrogated, Eastman denied that he ever had a gun, and that he asked anyone to "do a job with him and Croney," or that he saw Croney with a gun. *Id.* Following the detective's line of questioning, Eastman was arrested. *Id.*

20. *Id.* at 270-71, 648 N.E.2d at 462, 624 N.Y.S.2d at 86.

Before trial, Eastman argued that under *Bruton v. United States*,[21] severance of his case from co-defendant Croney's was required to avoid abridging his right of confrontation under the Sixth Amendment of the Federal Constitution, since Croney refused to testify at trial.[22] Eastman claimed his statement related to his "defense that Richards committed the crime while he merely exited the car to see what was happening with Richards."[23] The court refused to sever the cases.[24] Further, the court ruled that the co-defendant's statement (that he saw the defendant carry the gun back to the co-defendant's vehicle after the shoot-out and place it on the front seat) be omitted.[25]

In charging the jury, the court instructed them that Croney's statement could only be used against Croney and not Eastman.[26] Both Eastman and Croney were convicted of murder and criminal possession of a weapon in the second degree.[27] The judgment was affirmed by the appellate division.[28]

Eastman moved to vacate his conviction under *Cruz v. New York*.[29] In *Cruz*, the United States Supreme Court held that

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21. 391 U.S. 123 (1968). In *Bruton*, a witness testified that the co-defendant made an oral confession to him, stating that he and the defendant committed an armed robbery. *Id.* at 124. Both the co-defendant and the defendant were convicted of the crime. *Id.* The New York Court of Appeals affirmed the defendant's conviction. *Id.* at 124-25. However, the United States Supreme Court overturned the defendant's conviction, holding that "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [the defendant's] guilt, admission of [the co-defendant's] confession in [the] joint trial violated [the defendant's] right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Id.* at 126.

22. *Eastman*, 85 N.Y.2d at 271, 648 N.E.2d at 462, 624 N.Y.S.2d at 86.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 272, 648 N.E.2d at 462, 624 N.Y.S.2d at 86.

27. *Id.* at 273, 648 N.E.2d at 463, 624 N.Y.S.2d at 87.

28. *Id.*

29. 481 U.S. 186 (1987). In *Cruz*, co-defendant Eulogio Cruz told Norberto Cruz of his involvement in a robbery which resulted in his commission of murder. Co-defendant Benjamin Cruz relayed a similar description of the event to Norberto. *Id.* at 188. Subsequently, Benjamin Cruz

"where a nontestifying co-defendant's confession incriminating the defendant is not directly admissible against the defendant, . . . the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him."[30] Eastman argued that *Cruz* should be applied retroactively, and if applied in the instant case, would mandate reversal of his conviction.[31] Eastman's motion was denied and the appellate division affirmed.[32] The court of appeals granted leave and reversed the appellate division's ruling.[33]

The court of appeals considered Eastman's claim pursuant to *Teague v. Lane*,[34] where the United States Supreme Court held that "new rules of constitutional criminal procedure are applied retrospectively . . . where the new rule alters a bedrock procedural element of criminal procedure which implicates the fundamental fairness and accuracy of the trial."[35] Based on the rule set forth in *Teague*, the *Eastman* court noted that "*Cruz* unquestionably departs from established precedent, and implicates a bedrock procedural element – the Sixth Amendment

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confessed to police that he and three other co-defendants committed the robbery and that he had committed the murder. *Id.* The confession was later videotaped. *Id.* Both Eulogio and Benjamin Cruz were jointly tried for felony murder. *Id.* at 189. At trial, Benjamin's videotaped confession was introduced with a limiting instruction that it was only to be used against Benjamin, not Eulogio. *Id.* Additionally, Norberto's testimony regarding the co-defendants conversation with him about the incident was also admitted. *Id.* However, at the end of the trial, "Norberto's testimony stood as the only evidence admissible against Eulogio that directly linked him to the crime." *Id.* Both co-defendants were convicted and Eulogio's conviction was affirmed by the court of appeals. *Id.* The United States Supreme Court reversed and remanded Eulogio's conviction. *Id.* at 193.

30. *Eastman*, 85 N.Y.2d at 273, 648 N.E.2d at 463, 624 N.Y.S.2d at 87 (quoting *Cruz*, 481 U.S. at 193).

31. *Id.*

32. *Id.*

33. *Id.*

34. 489 U.S. 288 (1989).

35. *Eastman*, 85 N.Y.2d at 275, 648 N.E.2d at 465, 624 N.Y.S.2d at 89. *See* Teague v. Lane, 489 U.S. 288, 311-12 (1989).

right of confrontation."[36] Because the rule of *Cruz* is essential to a reliable conclusion of guilt or innocence, the Court found that the introduction of the co-defendant's incriminating "confession against the defendant undermined the fundamental fairness of the trial, where, as here, there was no opportunity for cross-examination to test the reliability of the co-defendant's confession."[37] Thus, the court in *Eastman* concluded that on collateral review of a conviction, the constitution mandates retroactive application of the rule in *Cruz*.[38]

After determining that *Cruz* must be applied retroactively, the court then considered the issue of whether the admission of co-defendant Croney's statement into evidence constituted harmless error.[39] When reviewing a constitutional error, the court must examine the entire record and must determine if the "confession so prejudiced the defendant that reversal of the conviction and a new trial is mandated."[40] The court must consider a number of factors, including the thoroughness of the "defendant's statement and the extent to which it explains defendant's participation in the crime without reference to the co-defendant's statement; whether the statement is corroborated or contradicted by objective evidence; and, whether defendant has repeated or repudiated the substance of the statement on subsequent occasions."[41]

An issue particularly noteworthy in the court's review of the error found in *Eastman* was "the impact of the co-defendant's inculpatory statement on defendant's repudiation of his previous statements."[42] During the trial, Eastman disavowed any criminal involvement in the event in question and renounced the incriminating statements made to the detective or assistant district attorney at the hospital, on the grounds that they were involuntary and unreliable "since they were obtained when his physical and mental capabilities were severely impaired after a

36. *Eastman*, 85 N.Y.2d at 276, 648 N.E.2d at 465, 624 N.Y.S.2d at 89.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 276-77, 648 N.E.2d at 465, 624 N.Y.S.2d at 89.
41. *Id.* at 277, 648 N.E.2d at 466, 624 N.Y.S.2d at 90.
42. *Id.*

seven-hour operation."[43] The *Eastman* court indicated that "the probable impact of the co-defendant's inculpatory statement on the mind of the average juror was extreme prejudice to defendant, eliminating any possibility that the jury would accept the defense theory."[44]

According to the court, co-defendant Croney's incriminating statement maintained Eastman's "conviction under a theory that each defendant was 'aiding the other and acting in concert with another' because only the co-defendant's statement links defendant to the crime and ascribes intent to him."[45] The defendant's statements have only placed him near the scene of the crime without explaining his presence "nor reveal a plan or motive to commit a crime."[46] The court found that it was the "comprehensive nature of the co-defendant's statement that provide[d] the only support for defendant's conviction."[47]

Furthermore, the court noted that although Barrett's hearsay statement that he possibly shot a suspect accounts for the bullet recovered from defendant's abdomen, without Croney's statement, "it too does nothing other than place defendant at the scene, a fact not changed by the ballistics evidence . . . ."[48] The court found that "the accuracy of Barrett's statement is itself hardly free from doubt given that the dying Barrett identified an alleged suspect who was not even at the scene."[49]

Therefore, the court determined that Eastman's conviction was in violation of his Sixth Amendment right of confrontation when the co-defendant's incriminating statement was admitted into evidence.[50] The court held that this ruling constituted harmful error and thus, mandated that the defendant be afforded a new trial.[51]

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 277-78, 648 N.E.2d at 465, 624 N.Y.S.2d at 89.
49. *Id.* at 278, 648 N.E.2d at 465, 624 N.Y.S.2d at 89.
50. *Id.*
51. *Id.*

The approaches used by federal and New York courts under their respective constitutions[52] differ with regard to the reliability of nontestifying co-conspirator's statements. In *Ohio v. Roberts*,[53] the United States Supreme Court established that when an out-of-court statement is sought to be introduced against a criminal defendant, the Confrontation Clause requires that the prosecutor either produce the out of court declarant for in court cross-examination[54] or show that he made reasonable efforts to produce the declarant,[55] and the statement must bear sufficient indicia of reliability.[56] Sufficient indicia of reliability can be presumed when the statement falls within a firmly rooted hearsay exception or if "particularized guarantees of trustworthiness" are shown.[57] In *United States v. Inadi*,[58] the Court also held that the Confrontation Clause does not require the prosecutor to show that the nontestifying co-conspirator is unavailable as a condition precedent to admitting the co-conspirator's out-of-court statement at trial.[59] The Court distinguished *Inadi* from *Roberts* by stating that *Roberts* pertained to testimony from a prior judicial proceeding while *Inadi* pertained to out-of-court statements by co-conspirators.[60] Furthermore, under *Bourjaily v. United*

52. U.S. CONST. amend. VI. The Confrontation Clause provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." N.Y. CONST. art. I, § 6. The New York provision states: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature of the cause of the accusation and be confronted with the witnesses against him." *Id.*

53. 448 U.S. 56 (1980). In *Roberts*, the preliminary hearing testimony of a declarant who was absent from the defendant's trial was admitted into evidence. *Id.*

54. *Id.* at 65.

55. *Id.* at 74.

56. *Id.* at 66.

57. *Id.*

58. 475 U.S. 387 (1986).

59. *Id.* at 400.

60. *Id.* at 393-94. Depending on the type of statement in question, different principles may apply. *Id.* at 395. In the case of former testimony, "when two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis,

States,[61] the Supreme Court held that "the co-conspirator exception to the hearsay rule is firmly rooted in our jurisprudence that, under this Court's holding in Roberts, a court need not independently inquire into the reliability of such statements."[62]

However, the New York Court of Appeals, in *People v. Sanders*,[63] adopted the *Roberts* test, stating "we need not and do not adopt in this case a rule by which every extrajudicial statement qualifying under [the co-conspirator] exception to the hearsay rule is admissible at a criminal trial notwithstanding the constitutional right of confrontation."[64] Although *Sanders* was decided over a decade ago, it is still considered good law.[65] The court of appeals has not proffered any reason to believe the approach taken in *Sanders* is no longer applicable.[66] In *People v. Persico*,[67] the Appellate Division, First Department, stated that

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favor the better evidence." *Id.* at 394. However, "if the declarant is unavailable, no 'better' version of the evidence exists, and the former testimony may be admitted as a substitute for live testimony on the same point." *Id.* at 394-95. Additionally, *Roberts* "rested in part on the strong similarities between prior judicial proceedings and the trial." *Id.* at 395. In the case of co-conspirators statements, "[b]ecause they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court." *Id.* Hence, it is likely that co-conspirators will speak differently amongst themselves than they would when they are on the stand at trial. *Id.* Furthermore, the positions of the co-conspirators have presumably changed between the time the statements were made and at trial, thus lessening the likelihood that any in-court testimony would "recapture the evidentiary significance of statements made when the conspiracy was operating in full force." *Id.*

61. 483 U.S. 171 (1987).

62. *Id.* at 183.

63. 56 N.Y.2d 51, 436 N.E.2d 480, 451 N.Y.S.2d 30 (1982).

64. *Id.* at 64, 436 N.E.2d at 486, 451 N.Y.S.2d at 36.

65. People v. Persico, 157 A.D.2d 339, 345, 556 N.Y.S.2d 262, 266 (1st Dep't 1990).

66. *Id.* at 344, 556 N.Y.S.2d at 265.

67. 157 A.D.2d 339, 556 N.Y.S.2d 262 (1st Dep't 1990). In *Persico*, the First Department noted that the most frequently adopted reasoning for explaining the hearsay exception is not reliability but rather an agency theory, estopping co-conspirators from disavowing statements made by other co-conspirators in furtherance of the conspiracy. *Id.* at 347, 556 N.Y.S.2d at 268.

the co-conspirator exception's "vintage alone does not warrant characterizing it as 'firmly rooted.'"[68] Thus under *Sanders*, "if the declarant is available, he or she will testify and the hearsay will be admitted."[69] However, "[i]f the declarant is unavailable, the hearsay will be admitted anyway, provided it is reliable."[70]

Thus, when comparing the Confrontation Clause under both federal and New York law, under the Federal Constitution, proof of the reliability of a co-conspirator's statement is not required because it is within a firmly rooted hearsay exception, whereas under New York law, the reliability is not necessarily present in each circumstance and thus, must be proven on a case-by-case basis.[71]

However, the court denounced such reasoning by finding that the rules of agency "are involved in determining against whom the evidence may be admitted . . . and not relevant in determining why it should be admitted." *Id.*

68. *Id.* at 348, 556 N.Y.S.2d at 268.

69. *Id.* at 349, 556 N.Y.S.2d at 269.

70. *Id.*

71. People v. Sanders, 56 N.Y.2d 51, 65, 436 N.E.2d 480, 486 451 N.Y.S.2d 30, 36 (1982). The *Sanders* court listed the following five factors it utilized to determine the reliability of the co-conspirator's statement: (1) it was recorded on tape leaving no question that the declarant made such statements, (2) the declarant had personal knowledge of the issues he stated and thus "no possibility that his statements were based on faulty recollection," (3) the declarant had no reason to fabricate at the time he made the statements "since he believed that he was speaking in confidence to a cohort engaged in a joint enterprise," (4) the statements were independently corroborated, and (5) the statements directly incriminated the declarant "in a joint criminal enterprise [thus] provid[ing] additional assurance of their trustworthiness." *Id.*